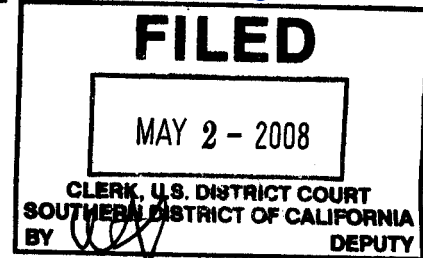


MR. E. W. BURTON # F02720
P.O. BOX 5246 - CORCORAN CA. 93212
IN PROPER



[PRISONER'S NAME & NUMBER]
[Prisoner's Mailing Address]
Name of Prison
City, State, Zip]
Petitioner, In Pro Per

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ERIC W. BURTON # F02720

[PRISONER'S NAME],

Petitioner,

DIRECTOR, CACR

~~[WARDEN'S NAME]~~, ENDREWS

Respondent.

No. 08-0325 LAB(POR)
DATE 4-27-08 REQUEST EVIDENTIARY
NOTICE OF APPEAL HEARING
PURSUANT TO 28 USC § 2253, RULE 22 FRAP,
AND NINTH CIRCUIT RULE 22-1, LA GRAND V.
STEWART (9TH CIR. 1998) 133 F.3d 1253;
SCHUP V. DELO (1995) 513 U.S. 298 [15 SCT.
851, 130 L. Ed. 2d 808; KELLY V. SMALL (9TH
CIR. 2003) 31 F.3d 1063; BENNETT V. MUELLER
9TH CIR. 2002) F. 3d 752; WILLIAM V. TAYLOR 659 US 362

Petitioner [PRISONER'S NAME], appearing in pro per, hereby appeals from the Judgment
of the court dismissing the Petition for Writ of Habeas Corpus in the above-entitled action. Said
Judgment was entered on OR ABOUT 4-25-08 by Hon. JUDGE BURNS.

Concurrently herewith, Petitioner requests that the District Court issue a Certificate of
Appealability. An application for COA is being contemporaneously filed.

Dated: 4-25-08

Eric W. Burton # F02720
[Prisoner's Signature]
[PRISONER'S NAME]
ERIC W. BURTON
Petitioner, In Propria Persona

STATEMENT OF FACTS - DISTRICT COURT IS PREJUDICIAL AND ERRONEOUS
IN IT'S RULING THAT PETITIONER DIDN'T USE THE PROPER FEDERAL HABEAS
CORPUS FORM, PETITIONER ALLEGES WITH CERTAINTY THAT HE DID
AND IT AFTER BEING HANDLED OVER NEATLY, ORGANIZED WITH ALL OF
IT'S ATTACHMENTS OF ADDITIONAL EXHAUSTED GROUNDS, CONTENTIONS,
FACTS AND ISSUES, EXHIBITS, DIRECTIONS, AND VERIFICATION, AND
DECLARATION TO PRISON AUTHORITIES, LEGAL MAIL PROCESSES ON OR
ABOUT 2-03-08, AND WAS FILED WITHOUT COMPLAINT TO THE EASTERN
DISTRICT COURT ON 2-06-08, JURISDICTION OF PETITIONER'S INCARCERATION
THEN TRANSFERRED TO THE SOUTHERN CA. DISTRICT AND FILED 2-19-08 APPROX.

ERIC BURTON #07120
P.O. BOX 5246 CSATF15-CT-1192
CORCORAN, CA 93212 IN PROPER

1 PETITIONER ALLEGES WITH CERTAINTY THAT HE HAS
2 EXHAUSTED HIS STATE REMEDIES IN THE CALIFORNIA
3 SUPREME COURT "LEAD" CASE NO. S152584 FILED ON 5-07-2007
4 REVIEW DENIED ON OR ABOUT 6-21-07, A FEDERALIZED PETITION
5 FOR REVIEW, SPECIFICALLY FILED ON IT'S FACE "PETITION FOR
6 REVIEW TO EXHAUST STATE REMEDIES. COURT GAVE NOTICE TO
7 ATTORNEY GENERAL - SAN DIEGO OFFICE - ASSOCIATE ATTORNEY
8 P.O. BOX 85266, SAN DIEGO, CA, 92186-5266. THE COURT OF
9 APPEALS 4TH DISTRICT DIV I DISPOSED: 4/25/2007 IN AN UNPUBLISHED
10 OPINION, GIVING PETITIONER 10 DAYS TO FILE FOR REVIEW IN THE
11 CALIFORNIA SUPREME COURT WHICH HE TIMELY FILED HIS
12 PETITION FOR REVIEW, IN re ERIC BURTON ON HABEAS CORPUS,
13 HIS ATTORNEY WAS LATE IN FILING, THERE WERE 2 DOGHOUSES
14 THE RECORD WAS REQUESTED ON 5-14-2007, AND THE COURT
15 OF APPEAL RECORD FILE JACKET WAS RECEIVED ON 5-15-2007.
16 PETITIONER'S APPEALS COUNSEL ON DIRECT APPEAL MISSTATED
17 THE FACTS ON DIRECT APPEAL, FAILED TO BRING FOR THE SEARCH
18 AND SEIZURE CLAIMS, AND OMITTED FACTS, AND OTHER
19 CONSTITUTIONAL DEPRIVATIONS OF PETITIONER'S FEDERALLY
20 GUARANTEED CONSTITUTIONAL RIGHTS. IN ADDITION PETITIONER
21 TIMELY FILED A MOTION FOR A NEW TRIAL BASED ON 5TH AND 14TH
22 AMENDMENT VIOLATIONS FOR PROSECUTIONS FAILURE TO DISCLOSE
23 MATERIAL EXCULPATORY EVIDENCE PURSUANT TO U.S. V. AGURS
24 U.S. (1976). PETITIONER HAD MADE A ERROR, AND MOTIONED
25 TO WITHDRAW THE MOTION FOR NEW TRIAL, REVIEW WAS DENIED,
26 AND A REMITTUR WAS ISSUED IN CALIFORNIA SUPREME
27 COURT CASE NO: S153203, COURT OF APPEAL, FOURTH APPELLATE
28 DISTRICT, DIV I NO. D047617; SUP. COURT OF S.D. COUNTY NO. SCE238643,

P.O. BOX 5246 - CSATF/SP-1-17K
COR CORANICA, 93212 IN PRO PER.

FILED BY HIS APPELLATE COUNSEL MS. KORYN OF KORYN & KORYN
5105 CASS ST, S.D. CA, 92108. ON 6-04-2007, WHO FAILED
TO FEDERALIZE "HER" PETITION FOR REVIEW. PETITIONER
HAD ALREADY FILED HIS PETITION AND REVIEW WAS DENIED
IN THE CALIFORNIA SUPREME COURT. PETITIONER HAD
A DENIED COLLATERAL H.C. PETITION ON DIRECT APPEAL
IN THE 4TH APPELLATE DISTRICT DIVISION I, S.D. CA CASE NO:
DO49846, THAT RAISED FEDERAL CONSTITUTIONAL VIOLATIONS
FILED ON OR ABOUT DEC. 18, 2006, DENIED ON OR ABOUT 4-25-07,
ARGUMENT REASONABLE JURIST WOULD FIND IT DEBATABLE
WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL
RULING, REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER
THE PETITION STATES A VALID CLAIM OF DENIAL OF A CONSTITUTIONAL
RIGHT ON EACH AND EVERY GROUND, CONTENTION, FACT AND ISSUE
RAISED IN PETITIONER'S FEDERALLY PROPERLY FILED PETITION FOR
RELIEF FOR AN UNCONSTITUTIONAL CONVICTION AND SENTENCE,
IN VIOLATION OF HIS FEDERALLY GUARANTEED U.S. CONSTITUTIONAL
RIGHTS, TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL OF
A JURY OF HIS PEERS, AND HIS FEDERALLY GUARANTEED
FOURTEENTH AMENDMENT RIGHT TO SELF REPRESENTATION,
DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED,
MEMORANDUM AND POINTS OF AUTHORITY
ARGUMENT A PLEADING IS DEEMED FILED WHEN IT IS DELIVERED TO
PRISON AUTHORITIES FOR MAILING SEE MILES V. PRUNTY (9TH CIR. 1999) 187 F.3d 1104,
LACK OF ACCESS TO ADEQUATE LEGAL MATERIALS, SEE WHALEN/HUNT V
EARLY (9TH CIR. 2000) 233 F.3d 1146; SEE STILLMAN V. LAMARQUE (9TH CIR.
2003) 319 F.3d 1199 (PETITIONER ENTITLED TO EQUITABLE TOLLING BECAUSE OF
PRISON OFFICIAL'S MISCONDUCT IN BREAKING PROMISE TO OBTAIN
SIGNATURE IN TIME FOR FILING); SEE ALSO BROWN V. ROE (9TH CIR. 2002) 279
F.3d 742; LA GRAND V. STEWART (9TH CIR. 1998) 133 F.3d 1253; SCHUP V. DE LO
(1995) 513 U.S. 298 [115 S.Ct. 851]; TILLEN V. LONG (9TH CIR. 2001) 253 F.3d 494.
PRAYER FOR RELIEF - PETITIONER PRAYS FOR RELIEF FROM AN UNCONSTITUTIONAL
CONVICTION AND SENTENCE, AND AN ERRONEOUS DISTRICT COURT'S RULING,
DISTRICT COURT HAS THE BROAD POWERS TO ISSUE COA AND JURISDICTION.

PROOF OF SERVICE

I, Eric Wilton Burton # F02720, CERTIFY AND DECLARE THAT I AM OVER THE AGE OF (18) YEARS, A PARTY TO THE WITHIN ACTION AND A CITIZEN AND OR RESIDENT OF THE UNITED STATES.

I SERVED THE FOLLOWING DOCUMENT(S), NOTICE OF APPEAL, APPLICATION FOR COR- VERIFIED DECLARATION, COPY OF FEDERAL TRANSFER ORDER, PROOF OF EXHAUSTION OF REMEDIES, MOTION FOR APPOINTMENT OF COUNSEL - UPON THE PARTIES LISTED BELOW BY PLACING SEALED ENVELOPES IN THE UNITED STATES MAIL HERE AT CSATF/SA P.O. BOX 5246, CORCORAN, CALIFORNIA AS FOLLOWS:
93212

REQUEST DISTRICT COURT TO GIVE NOTICE TO ALL PARTIES INVOLVED IN THE INSTANT MATTER INCLUDING THE RESPONDENT THE DIRECTOR OF C.D.C.P. AND THE ATTORNEY GENERAL - S.D. CA, OFFICE ASSOCIATE ATTORNEY P.O. BOX 85266, SAN DIEGO, CA, 92186-5266.

I, ERIC WILTON BURTON # F02720, SWEAR UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AND DATED THIS 28 DAY OF APRIL, 20 08

Eric W. Burton # F02720
DECLARANT

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 ERIC WILTON BURTON,

12 Petitioner,

13 v.

14 DIRECTOR OF CALIFORNIA
15 DEPARTMENT OF CORRECTIONS
AND REHABILITATION,

16 Respondent.

Civil No. 08-0325 LAB (POR)

**ORDER GRANTING APPLICATION
TO PROCEED IN FORMA
PAUPERIS AND DISMISSING
PETITION WITHOUT PREJUDICE**

17 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas
18 Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

19 **REQUEST TO PROCEED IN FORMA PAUPERIS**

20 Petitioner has no funds on account at the California correctional institution in which he
21 is presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS**
22 Petitioner's application to proceed in forma pauperis. The Clerk of the Court shall file the
23 Petition for Writ of Habeas Corpus without prepayment of the filing fee.

24 **FAILURE TO USE PROPER FORM**

25 A Petition for Writ of Habeas Corpus must be submitted in accordance with the Local
26 Rules of the United States District Court for the Southern District of California. *See* Rule 2(c),
27 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be submitted

28 ///

1 upon a court-approved form and in accordance with the instructions approved by the Court.
2 Presently, Petitioner has submitted an application for writ of habeas corpus on a non-approved
3 form.

4 **FAILURE TO ALLEGE EXHAUSTION OF STATE COURT REMEDIES**

5 The Petition must be dismissed because Petitioner has not clearly alleged exhaustion of
6 state judicial remedies as to all of his claims. Habeas petitioners who wish to challenge either
7 their state court conviction or the length of their confinement in state prison, must first exhaust
8 state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34
9 (1987). To exhaust state judicial remedies, a California state prisoner must present the
10 California Supreme Court with a fair opportunity to rule on the merits of every issue raised in
11 his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.
12 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how
13 one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v.*
14 *Henry*, 513 U.S. 364 (1995) reasoned: "If state courts are to be given the opportunity to correct
15 alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the
16 prisoners are asserting claims under the United States Constitution." *Id.* at 365-66 (emphasis
17 added). For example, "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a
18 state court trial denied him [or her] the due process of law guaranteed by the Fourteenth
19 Amendment, he [or she] must say so, not only in federal court, but in state court." *Id.* at 366
20 (emphasis added).

21 Petitioner fails to clearly allege that he raised each of his claims in the California Supreme
22 Court. Although Petitioner alleges he was denied habeas relief in the California Supreme Court,
23 it is impossible to discern from his voluminous and unorganized petition, whether the claims he
24 raises here were raised before the state supreme court.¹ If Petitioner has raised his claims in the
25 California Supreme Court he must so specify, as to each claim. "The burden of proving that a
26 claim has been exhausted lies with the petitioner." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th

27
28 ¹ The Court notes that previous petitions for habeas corpus filed in this Court by Petitioner were dismissed pursuant to the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). See *Burton v. Clark*, 06cv2336 LAB (NLS) (Order filed Oct. 10, 2006) (doc. no. 3); *Burton v. Hernandez*, 06cv1384 L (JMA) (Order filed May 15, 2007) (doc. no. 5).

1 Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134
2 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v.*
3 *Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

4 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
5 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
6 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
7 period shall run from the latest of:

8 (A) the date on which the judgment became final by the
9 conclusion of direct review or the expiration of the time for seeking
such review;

10 (B) the date on which the impediment to filing an application
11 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
by such State action;

12 (C) the date on which the constitutional right asserted was
13 initially recognized by the Supreme Court, if the right has been
14 newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
16 claims presented could have been discovered through the exercise
of due diligence.

17 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

18 The statute of limitations does not run while a properly filed state habeas corpus petition
19 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
20 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
21 when its delivery and acceptance [by the appropriate court officer for placement into the record]
22 are in compliance with the applicable laws and rules governing filings.”). However, absent some
23 other basis for tolling, the statute of limitations does run while a federal habeas petition is
24 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

25 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
26 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
27 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.

28 ///

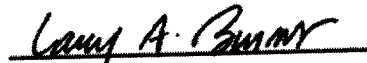
1 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
2 habeas relief because he has not alleged exhaustion of state court remedies.

3 CONCLUSION

4 For the foregoing reasons, the application to proceed in forma pauperis is **GRANTED**
5 and the Petition is **DISMISSED** without prejudice for failure to use the proper form and failure
6 to allege exhaustion of state court remedies. In order to have this case reopened, Petition must,
7 **no later than June 16, 2008**, file a First Amended Petition, on the proper form, in which he
8 includes a succinct and clear explanation of his claims and alleges exhaustion of state judicial
9 remedies as to each claim he has raised before the California Supreme Court. *For Petitioner's*
10 *convenience, the Clerk of Court shall attach to this Order a blank First Amended Petition form.*

11 **IT IS SO ORDERED.**

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13 DATED: April 17, 2008

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15 **HONORABLE LARRY ALAN BURNS**
16 United States District Judge
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Notice of Appeal Notification Form

To: Clerk, U.S. Court of Appeals
From: U.S. District Court, Southern District of California
Subject: New Appeals Case Information & Docket Fee Notification

Date: 05/5/08

Case Information

Case Title: Eric Wilton Burton v. Director
 U.S.D.C. No.: 08cv325 LAB (POR) U.S.D.C. Judge: Larry Alan Burns
 Complaint/Indictment/Petition Filed: Petition for Writ of Habeas Corpus
 Appealed Order Entered: 4/18/2008
 Notice of Appeal Filed: 5/2/2008
 Court Reporter: n/a

COA Status: ☐ Granted in full/part (appeal only) ☐ Denied (send clerk's file)

Docket Fee Notification

Docket Fee: ☐ Paid ☐ Not Paid ☒ No Fee Required

USA/GOVT. APPEAL: ☐ Yes ☒ No

Date F/P granted (Show Date and Attach Copy of Order): 4/18/2008

Was F/P Status Revoked? ☐ Yes ☒ No

Companion Case(s): (Please list consolidated cases, if applicable) _____

Counsel Information

Appellant Counsel:

Eric Wilton Burton
 F-02720

 California State Prison, Corcoran
 PO Box 8800
 Corcoran, CA 93212

Appellee Counsel:

Attorney General
 Office of the Attorney General, State of CA

 110 West A Street
 Suit e1100
 San Diego, CA 92101-5266

 (619) 645-2076

Counsel Status: ☐ Retained ☐ Appointed ☒ Pro Se

Appointed by: _____
 (Attach copy of order/minutes)

Defendant Information

Prisoner ID Number: F-02720

Bail: _____
 Custody: x

SERVICE LIST

Counsel for Appellant(s) and Appellee(s), as listed on the previous page, have been sent copies of the following items:

x	Transmittal of U.S.C.A. (Appellant and Appellee)
x	Case Information/Docketing Fee Notification Form. (Appellant Only)
x	Notice of Appeal. (Appellant, Appellee, U.S. District Judge, USPO, and Court Reporter)
x	Docket Entries (Appellant and Appellee)
x	Designation of Reporter's Transcript and Ordering Form. (Appellant Only, mailed separately)
	Order for Time Schedule. (Criminal Only) (Appellant, Appellee, and Court Reporter)
	Magistrate Judge's Report and Recommendation
	COA Order
x	F/P Order (In Order Entered 4/18/2008)
	Minute Order
x	Other: Order Dismissing Petition without Prejudice entered 4/18/2008

Form Completed And Documents Served By U.S. District Court Deputy Clerk:

L. Hammer

Lauren Hammer

Deputy's Name

Deputy's Signature

UNITED STATES DISTRICT COURT
Southern District Of California
Office Of The Clerk
880 Front Street, Room 4290
San Diego, California 92101-8900
Phone: (619) 557-5600
Fax: (619) 702-9900

W. Samuel Hamrick, Jr.
Clerk of Court

To: Clerk, U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Re: **USCA No:**
USDC No: 08cv325 LAB (POR)
Burton v. Director

Clerk, U.S. Court of Appeals, enclosed herewith you will please find:

x	Copy of the Notice of Appeal	x	Docket Entries
x	Case Information/Docket Fee Payment Notification Form		
	Order for Time Schedule (Criminal)		
	Original Clerk's Record in	set(s) of	volume(s).
	Reporter's transcript's transcripts in	set(s) of	volume(s).
	Exhibits in	envelope(s)	box(es) folders(s)
	Judgement Order	x	F/P Order
	CJA Form 20		Minute Order
	Certificate of Record		Mandate Return
	Magistrate Judge's Report and Recommendation		
	COA Order		
	Amended docket fee notification form		
	Order Appointing Counsel for Appeal		
x	Order Dismissing Petition without Prejudice entered 4/18/2008		
x	Please acknowledge on the enclosed copy of this transmittal		

Sincerely yours,

W. Samuel Hamrick, Jr.
Clerk of Court

By: **L. Hammer**
Lauren Hammer, Deputy

Date: 05/5/08